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IN THE

Supreme Court of the United States

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CLERK

OCTOBER TERM, 1945.

No. 248.

WILLIAM I. HEFFRON, Trustee of the Estate of William Nelson Hamaker, Bankrupt,

Petitioner,

vs.

WILLIAM NELSON HAMAKER,

Bankrupt.

WILLIAM I. HEFFRON, Trustee of the Estate of Orelia B. Hamaker, Bankrupt,

Petitioner,

vs.

ORELIA B. HAMAKER, Bankrupt,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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vs.

ORELIA B. HAMAKER, Bankrupt,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

This is a Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals brought before this court under the provisions of Section 24c of the National Bankruptcy Act, 11 U. S. C. A., Sec. 47-c, and Sec. 240 of Judicial Code, 28 U. S. C. A., Sec. 347.

The jurisdiction of the District Court was invoked under the provisions of Section 2, Subdivision 2, of the National Bankruptcy Act, 11 U. S. C. A., Sec. 11, Subdivision 2.

Jurisdiction of the Circuit Court of Appeals was invoked under the provisions of Section 24-a of the National Bankruptcy Act, 11 U. S. C. A., Section 47-a.

The order of the trial court (Referee in Bankruptcy) was entered on April 27, 1944. [Tr. p. 12.] The order of the District Court affirming the Referee's Order on Review was entered July 22, 1944. [Tr. p. 83.] The order of the Circuit Court of Appeals reversing the order of the District Court was entered on February 28, 1945.

A Petition for Rehearing was filed within thirty days thereafter and was denied on May 29, 1945.

The Opinion of the Appellate Court will be found no doubt in the 148th Volume of Federal Reporter 2nd, but petitioner does not have the page at the time of preparing this Petition for Writ of Certiorari by reason of the fact that the Opinion has not yet been published in the Advance Sheets but appears in the Transcript of Record herein.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit Requiring It to Certify to the Supreme Court of the United States for Its Revision and Determination the Petition for Review in Bankrupcy Taken by Said Respondent Against Petitioner, Lately Pending in Said Circuit Court of Appeals.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Petition of William I. Heffron as Trustee in Bankruptcy for the estates of William Nelson Hamaker, Bankrupt, and Orelia B. Hamaker, Bankrupts, filed by virtue of the provisions of Section 24-c of the National Bankruptcy Act, 11 U. S. C. A., Section 47-c, respectfully represents as follows:

One: That this question involves a question of far reaching importance to mercantile and business interests of the country and upon which the decisions of the Circuit Courts of Appeal in the different circuits are at variance and is in conflict with applicable decisions of this court, thus necessitating an authoritative determination thereon by this court.

Two: The questions involved are as follows:

1. May a married woman residing in a community property state execute a promissory note jointly with her husband, procure deferment of the enforcement of an existing obligation of her husband, in excess of $12,000.00 for a period of almost nine years by reason of the execu-

tion of said promissory note, and when suit is threatened thereon, fraudulently convey all of her separate property, in secret trust, to her brother, suffer and permit judgment to be entered against her on said promissory note, *collect the income from said property secretly, through her brother, over a period of approximately seven years*, utilizing the income for the benefit of herself and her husband, then go through bankruptcy, concealing her secret trust in said property and the income therefrom from her Trustee, obtain her discharge from the troublesome judgment and, seven days after her discharge, procure a reconveyance to her of said fraudulently transferred property and upon ultimate discovery of the fact by a creditor, on the reopening of her bankruptcy, successfully retain the concealed property as against her Trustee free and clear of any claims of the Trustee or her creditors to such property?

2. Is a bankrupt anywhere in the United States, whether residing in a community property state or otherwise, entitled to retain as against a Trustee in Bankruptcy, property not specifically exempted under the exemption laws of the State in which she resides or under Sec. 6 of the National Bankruptcy, 11 U. S. C. A., Sec. 24? (Italics ours.)

That the proceedings had in the court below in brief were as follows:

The bankrupt, William Nelson Hamaker, was a former banker. The bankrupt, Orelia B. Hamaker, is his wife. During his banking career the bankrupt, William Nelson Hamaker, became involved with the Bank of Italy, predecessor of the creditor, Bank of America, to the extent of approximately $12,500.00, by reason of some loans which he had made as a banker and for which he states he had

been criticized. [Tr. p. 70.] This was prior to November 8, 1927. [Tr. p. 79.] On November 8, 1927, both bankrupts, husband and wife, executed a promissory note in favor of the Bank of Italy in the sum of $12,500.00. [Tr. of Rec. p. 79.] The Bank of America acquired the note through a merger of the Bank of Italy and the Bank of America. [Testimony of J. F. Liebenguth, Tr. p. 39.] The note was thereafter assigned to one A. G. Brown for collection and suit was instituted and judgment obtained against Orelia B. Hamaker for the unpaid balance of $7,918.49, plus attorneys' fees, on which nothing had been paid. [Tr. p. 39.] Judgment was entered against Mrs. Hamaker on July 22, 1936, in the sum of $7,918.49 principal, interest in the sum of $307.55, and attorneys fees and costs. [Tr. p. 74.] This judgment was never appealed from and has long since become final. Hamaker upon being sued, promptly went through bankruptcy and obtained his discharge so no judgment was entered against him. [See Referee's Finding of Fact No. 2, Tr. p. 14.] After obtaining his discharge Hamaker obtained a reconveyance to him of certain valuable oil paintings which he had concealed from his Trustee in his wife's name. Orelia B. Hamaker, with her husband safely discharged from his debts, then executed a bill of sale back to Hamaker of these oil paintings, together with certain statuary, and in the reopened bankruptcy proceedings upon discovery of the fact, the Trustee, by order of the Referee, obtained a conveyance to him of the oil paintings and statuary, which order was affirmed by the District Judge and likewise by the Circuit Court of Appeals. [See Tr. p. 19.]

At the time of the execution of the promissory note in November of 1927, Orelia B. Hamaker was the owner of a one-fourth interest in valuable real property situated back in York, Nebraska. The other three-fourths interest in

said real property was held by her brother, Dr. John C. Boyer, and two sisters. At the time of the execution of the promissory note in 1927 Mrs. Hamaker's mother was collecting all of the income from this real property. Beginning with the year of 1929, the four children thereafter received the income in equal parts, which was distributed by the First Trust Company of York, Nebr., in the form of a check, and was used by the bankrupt, Orelia B. Hamaker, and her husband. [Tr. p. 41.] At that time she was indebted to the Bank of America on the promissory note in question and continued so through 1933 [Tr. p. 41], and is still indebted to the Bank. She never disclosed to the Bank that she and her husband were jointly receiving income from this Trust Company and did not know whether the money was ever deposited in a bank account. She did not inform either the Bank of Italy or the Bank of America that she had any interest in this trust. [Tr. p. 42.]

On March 30, 1933, she executed a conveyance of her interest in this York, Nebraska, property to her brother, Dr. Boyer, which was withheld from record for a year and a half until October 27, 1934. [Tr. p. 42.] The income from this property, according to her testimony, amounted to approximately $100.00 per month. [Tr. p. 42.] On her cross-examination under Section 21-j of the National Bankruptcy Act (11 U. S. C. A., Sec. 44-j) she denied that she had received *any income* from the property between 1933 and 1940 [Tr. p. 42], a statement which was absolutely false, as later appeared when Dr. Boyer's income tax returns for those years arose to confront her. She later reluctantly admitted that during that period Dr. Boyer gave her "some money to live on because they were so close to each other." [Tr. p. 58.]

In addition to the real property back in York, Nebraska, the bankrupt, Orelia B. Hamaker, on February 6, 1934 [Tr. Rec. 37] transferred to Dr. Boyer an oil royalty interest in Fresno County, California, from which she received an income of $15.00 or $20.00 per month. This was likewise transferred back to her after her bankruptcy discharge by Dr. Boyer, she having received this income in the interim also. [See Tr. p. 54.]

During the years from 1933 to 1940 Dr. Boyer religiously turned over to Mrs. Hamaker the income from these properties and took credit for it in his income tax returns, which were procured through his personal representative, he now being deceased. In each of these income tax returns throughout the years Dr. Boyer claimed credit for one-half of the income received by him from the York, Nebraska, property with the following statement, of which the income tax return for the year 1935 is a fair sample:

> "Income from rents and royalties received, $2,492.48. Reported $1,246.24 as his income and stated therein under oath that the other $1246.24 was 'paid to my sister as her share of the estate through an arrangement with the Trust Company all monies being paid to him for distribution to his sister.' [Tr. p. 50.]"

Other income tax returns for the years of 1936, 1937, 1938 and 1939 with similar statements thereon were marked for identification at Transcript page 50 and were received in evidence at Transcript page 68.

After turning over to her all of her share of the income from this property, Dr. Boyer, sometime prior to November 2, 1939, took steps to get the property back into Mrs. Hamaker's name in such a way that her creditors could not reach it. He consulted attorney A. L. Abrahams as to

what method he could invoke to get the property back to her, *but he did not want to get it back to her in such a way that her creditors could get it.* [See cross-examination of A. L. Abrahams, Tr. p. 73.] Mr. Abrahams advised him that it could be done by either creating a spendthrift trust or putting his sister through bankruptcy. She then went through bankruptcy. (Italics ours.)

She did not schedule any property whatsoever, nor did she disclose her ownership or interest in any property to her Trustee, Hubert F. Laugharn. He closed the estate as a no asset estate. [See testimony of Hubert F. Laugharn, Tr. p. 40.] She received her discharge in bankruptcy on February 6, 1940. [Finding of Fact No. 2, Tr. p. 14.] Seven days later, on February 13, 1940, Dr. Boyer executed a reconveyance to her of the York, Nebraska, property. [Finding of Fact 27, Tr. p. 18.] The oil royalty interest was reconveyed in August, 1942. [Finding of Fact No. 10, Tr. p. 21.] This deed was withheld from record in excess of three years, being recorded in York County, Nebraska, on February 16, 1943. [See Stipulation of Facts, Tr. p. 38.] On February 20, 1940, the fraudulent transferee, John I. Boyer, gave written instructions to pay all future income from the one-fourth interest in the property directly to Orelia B. Hamaker instead of through him. [See Tr. p. 38.] Thereafter Mrs. Hamaker collected the income herself directly.

That a conspiracy existed between these people to defraud the Bank of America was amply proven. In addition to their false testimony in their original bankruptcy

proceeding and their failure to schedule the fraudulently transferred and concealed property, Orelia B. Hamaker and her brother, John I. Boyer, conclusively demonstrated that it was not through an oversight that her interest in these properties was not disclosed. The witness, Mrs. Alicia Boyer, testified that after her bankruptcy Mrs. Hamaker boasted to her as follows:

> "Well, I have surely put it over on those attorneys. When they called upon me to declare my assets—I was asked to declare my assets and I took down some old novelty jewelry, and when I was asked if that was all I had I told them yes." [Tr. p. 67.]

Later on when the reconveyance of the property was to be made it was necessary to procure Mrs. Alicia Boyer's signature on the deed as the wife of Dr. John I. Boyer. Dr. Boyer called his wife down town in Long Beach to sign the deed. They were looking for a Notary. Mrs. Boyer suggested going into a branch of the Bank of America to have the deed acknowledged before a Notary. Her husband exclaimed, *"Oh, my gosh, no! Bill warned me by all means not to go to the Bank of America because they might trace this down."* They went to another Notary to have the deed notarized. [Tr. p. 67.] This witness also testified that Dr. Boyer cashed the checks received from the oil royalties and gave his checks in turn to Mr. Hamaker. [Tr. p. 68.] In 1938 when making out his income tax return when he gave it to Mrs. Boyer to sign, she quotes him as saying:

> "See, this is how I account for Ora's income from the York, Nebraska, property. I deduct it from my

own income that is her income and I make that statement."

Based on the foregoing facts, Referee Utley made Findings of Fact, Conclusions of Law and an Order requiring these bankrupts to execute conveyances to their Trustee of the assets which they had succeeded in concealing throughout their original bankruptcy proceeding. [Findings of Fact, Conclusions of Law and Order requiring them to reconvey the property which they had concealed to their trustee, Tr. pp. 12 to 26.] Both bankrupts petitioned the District Court for a review of the Order and the Order was affirmed by District Judge Leon R. Yankwich on July 22, 1944. [Tr. pp. 81 to 83.] An appeal was thereupon taken by both bankrupts to the United States Circuit Court of Appeals for the Ninth Circuit, which reversed the orders of both the District Judge and the Referee insofar as Mrs. Hamaker's concealed assets were concerned and affirmed as to Hamaker's concealed pictures.

The petition for rehearing was denied by the Circuit Court of Appeals on May 29, 1940.

The judgment of the Circuit Court of Appeals should be reversed by reason of the fact that the Opinion was based upon an erroneous conception of the laws of the State of California, relating to promissory notes and the law of debtor and creditor, is contrary to the express provisions of the Bankruptcy Act, as repeatedly construed by the courts, requiring bankrupts to fully and fairly disclose and surrender all of the property not exempt by the laws of their domicile, for administration for the benefit of their

creditors; that it seriously undermines the express provisions of Section 70-a of the National Bankruptcy Act, and that it is contrary to the rule laid down by the United States Circuit Court of Appeals for the Seventh Circuit. (In the Matter of Breitling, 133 Fed. 146, 13 A. B. R. 126.)

Your petitioner further contends that this decision, if it stands, will result in a revolutionary judicial revision of the provisions of Section 70-a and e of the National Bankruptcy Act (11 U. S. C. A. Section 110-a and e), permitting bankrupts, if married women, to place their property in trust, defeat their obligations by means of a bankruptcy proceeding and yet retain property which is not specifically exempted under state law or under the Bankruptcy Act.

Your petitioner also submits that said decision and opinion of the Circuit Court of Appeals runs absolutely counter to the decisions of this court regarding fraudulent conveyances and collusive transfers of bankrupt's property as enunciated in *Buffum v. Barceloux*, 289 U. S. 227; *Imperial Paper and Color Corporation v. Sampsell*, 313 U. S. 215, *American Surety Co. v. Marotta*, 287 U. S. 513, and numerous other decisions of this court condemning fraud in bankruptcy proceedings.

Your petitioner annexes hereto his Brief in Support of his Petition.

Wherefore, your petitioner prays a Writ of Certiorari may issue out and under the seal of this court directed to the United States Circuit Court of Appeals for the Ninth

Circuit commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in this case therein entitled William Nelson Hamaker, Appellant, v. William I. Heffron, Trustee of the Estate of William Nelson Hamaker, Bankrupt, Appellee. Orelia B. Hamaker, Appellant, v. William I. Heffron, Trustee of the Estate of Orelia B. Hamaker, Bankrupt, Appellee, for review, Number 10,856, to the end that said case may be reviewed and determined by this court as provided by law, and that the judgment of the said Circuit Court of Appeals in said case may be reversed by this Honorable Court, and the Orders of the District Court and Referee affirmed *in toto*.

And that petitioner may have such other and further relief as may seem meet and proper

And your petitioner will ever pray.

WILLIAM I. HEFFRON,
As Trustee in Bankruptcy for the Estates of William Nelson Hamaker and Orelia B. Hamaker, Bankrupts,

THOMAS S. TOBIN,
817 Board of Trade Building, Los Angeles 14, California,

GEORGE A. HART,
514 Security Building, Long Beach, California,
Attorneys for Petitioner.

United States of America, Southern District of California, Central Division, County of Los Angeles—ss.

William I. Heffron, being by me first duly sworn, deposes and says:

That he is the Trustee in Bankruptcy and petitioner has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

WILLIAM I. HEFFRON.

Subscribed and sworn to before me this 6th day of July, 1945.

C. W. ROBINSON,
Notary Public, in and for the County of Los Angeles, State of California.

Certificate of Counsel.

I, Thomas S. Tobin, a member of the bar of this court, hereby certify that I believe the foregoing Petition for Writ of Certiorari is well founded and meritorious, and is not interposed for the purpose of delay.

THOMAS S. TOBIN.

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ORELIA B. HAMAKER, Bankrupt,

Respondent.

ARGUMENT, POINTS AND AUTHORITIES.

At the onset of this Brief in support of the petition for writ of ceriorari we assert without fear of successful contradiction that the bankruptcy of these bankrupts constitutes nothing more or less than a classical type of fraudulent failure so often encountered in the business and commercial world. We have here two bankrupts, husband and wife, who incurred a substantial obligation in the sum of $12,500.00, evidenced by a promissory note held by

the Bank of Italy and later the Bank of America, transferring their property back and forth to each other as the exigencies of their respective financial situations required, or to a close relative of one of them, both invoking the aid of the National Bankruptcy Act to discharge the obligation and at the same time successfully concealing their assets.

It is needless to say that we were more than surprised that the Circuit Court of Appeals for the 9th Circuit permitted such conduct to go unchallenged, and we, therefore, earnestly request that this court grant the writ of certiorari prayed for and undo the damage that will be done to the National Bankruptcy Act by the Circuit Court of Appeals if this opinion is permitted to become the law at least in this Circuit. The Circuit Court of Appeals in its Opinion says:

> "In order to determine whether a fraudulent transfer was omitted we must decide whether the Bank was ever a creditor of the wife."

In 1927 when this promissory note was executed by both bankrupts Section 3429 of the Civil Code of California defined a debtor as follows:

> "A debtor, within the meaning of this title is one who, by reason of an existing obligation, is *or may become* liable to pay money to another, whether such liability is certain or contingent." (Italics ours.)

At the same time Section 3430 of the Civil Code of California defined a creditor as follows:

> "A creditor, within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is, *or may become*, entitled to the payment of money." (Italics ours.)

At the same time Section 3439 of the Civil Code of California provided as follows:

> "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

These Sections were enacted in 1872 and remained the same down to the year 1939 when the Legislature of California adopted the Uniform Fraudulent Conveyance Act, but its adoption made no material change in the law with regard to debtor and creditor in California. These Sections were in full force and effect at the time of the incurring of the original obligation in the sum of $12,500.00 by Hamaker, in connection with loans made by him as a banker; they were the same in November of 1927 when he and his wife executed a promissory note in the sum of $12,500.00 to gain a nine year extension of time on the enforcement of the obligation; they were the same when Mrs. Hamaker, in 1933, conveyed her property to Dr. John I. Boyer; they remained the same throughout the period of the secret trust during which she collected the income and used it for the benefit of herself and her husband, and we submit that the Circuit Court of Appeals is in error in holding that the Bank of America did not fall within the statutory definition of a creditor either under the Bankruptcy Act or under the State Law of California. (*American Surety Co. v. Marotta*, 287 U. S. 513.)

The Circuit Court of Appeals for the 9th Circuit has gone on the theory that the debt involved was the debt of

Mr. Hamaker; that it was not Mrs. Hamaker's debt, and that there was no consideration to support the obligation. Now let us see what the law of California was throughout all of the period herein involved. Section 3105 of the Civil Code of California read:

> "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."

Section 3106 of the Civil Code of California read as follows:

> "Value is any consideration sufficient to support a simple contract. An antecedent or preexisting debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

Section 3107 of the Civil Code of California read as follows:

> "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time."

Section 3109 of the Civil Code of California read as follows:

> "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise."

Section 3110 of the Civil Code of California read as follows:

> "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or in-

dorser, without receiving value therefor, and for the purpose of lending his name to some other person. *Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.*" (Italics ours.)

Bearing in mind the fact that by the execution of this promissory note which was secured by a trust deed, which proved to be inadequate security, these bankrupts obtained an extension of time in which to satisfy Hamaker's obligation to the Bank of a period of 9 years. We wish to direct the court's attention to decisions of the Supreme Court of California on the question as to whether forbearance constitutes a valuable consideration.

In *Bridge v. Ruggles*, 202 Cal. 326, the Supreme Court said at page 328:

> "Any question as to the sufficiency of the consideration for the note and for Mrs. Ruggles' signature as accommodation indorser may be dismissed at once, as the pre-existing debt was sufficient consideration. (Whelan v. Swain, 132 Cal. 389; Mahana v. Van Alstyne, 179 Cal. 725.) The court found on sufficient evidence that the plaintiff was a holder for value, and under the provisions of Section 3110 of the Civil Code an accommodation indorser is liable to such a holder as an indorser."

In *Adolph Ramish, Inc. v. Woodruff*, 2 Cal. (2d) 190, the court said at page 207:

> "It has been repeatedly held that the extension of time in which to pay money due confers upon the debtor an advantage or benefit which in itself constiutes a sufficient consideration for the execution of an instrument by him, and that where the instrument is executed *by a third person* in consideration

> of an extension given to the debtor, the detriment to the creditor is a sufficient consideration to support the promise of the third person. (19 Cal. Jur. pp. 841, 842, Sec. 37; Westphal v. Nevills, 92 Cal. 545; Guy v. Bibend, 41 Cal. 322.) Any suspension or forbearance of a legal right constitutes a sufficient consideration. Thus an agreement to forbear to sue upon an obligation presently due is a sufficient consideration for the giving of a note. *Even though the forbearance is for one day only, there is a sufficient consideration as the law does not weigh the quantum.*" (Italics ours.)

In the early case of *Damon v. Pardow,* 34 Cal. 278, the court said:

> "The note in suit is the joint and several note of the makers. As between them and the payee they are both principals. *If one of the makers received all the consideration, or if one be surety for the other as between themselves, it is a matter about which the payee is not concerned.* As to him they are both principals notwithstanding, and hence if the relationship suggested exists between them it cannot be made the subject of judicial inquiry in this action." (Italics ours.)

Referring to Section 3109 of the Civil Code of California, it is well settled in this state that the defense of lack of consideration must be pleaded and established in the trial court and not raised for the first time on appeal. In the case at bar when Hamaker was sued on this promissory note he went through bankruptcy before judgment could be taken against him. [Tr. p. 39.] His co-defendant, Orelia B. Hamaker, did not raise the defense in the Superior Court, of lack of consideration, and the Superior Court rendered judgment against her. That judg-

ment has long since become final. When she filed her petition in bankruptcy, seeking to discharge the judgment, in November of 1939, she scheduled the Bank as a creditor and raised no objection to the allowance of the Bank's claim against her estate and the claim was accordingly allowed. [See Referee's Finding of Fact No. 4 of Transcript p. 15.] In the reopened proceeding, after discovery of the concealment and fraudulent transfer by the Bank of America, the Trustee alleged in his petition for a turnover order that both of these bankrupts were indebted to the Bank of America, and that they had accomplished fraudulent conveyances of their assets while so indebted. [See Allegation No. 4, Transcript, pp. 4, 5 and 6.] Nowhere in the proceeding that followed before the Referee was any answer filed setting up the affirmative defense of lack of consideration by either of these bankrupts; nor nowhere in the trial of the proceedings was such a question raised by either of them, and the Trustee relying on the statutory presumptions hereinbefore set forth under the Civil Code of California, and relying on the solemn judgment of the Superior Court of the State of California in and for the County of Los Angeles, which is in evidence here [Tr. p. 74], as being *res adjudicata* on the validity and amount of the debt, introduced no further evidence on that subject. Had the question been raised in the trial court we most certainly would have met it.

It was not even contended on the petition for review before the District Judge that there was a lack of consideration in the Bank's claim. The Petition for Review was devoted mainly to the question of the sufficiency of the value of the security under the trust deed and with the question of fraud. The question of consideration was only superficially touched upon under Paragraph 7-f of

the Petition for Review of the Referee's Order. [Tr. p. 32.] We quote petitioner's language:

> "(f) Because it appears from the evidence that said indebtedness to said Bank was not incurred by the Bankrupt Orelia B. Hamaker in any manner *for her own use and benefit,* or connected with her separate estate or property, or any business in which she was separately engaged, but on the contrary, the evidence shows that it was an indebtedness *primarily* of William Nelson Hamaker." (Italics ours.)

With these observations in mind we refer the court to the following decisions of the Supreme Court of California: In *Pastene v. Pardini,* 135 Cal. 431, the Supreme Court of California said:

> "As to the second and third contentions, that the defendant was deprived of his defenses of lack of consideration and payment, it is sufficient to say that such defenses are affirmative defenses to be pleaded, and this defendant did not do. He contented himself in his answer with a naked denial of the averments of the complaint, and this, as has been repeatedly held in this and in other code states, is not sufficient to raise either of these issues. 'A promissory note imports a consideration, and therefore it is not necessary that a consideration should be specially alleged. If there was no consideration, the defendant should have filed an answer setting up a want of it as a defense to the action.' (Winters v. Rush, 34 Cal. 136.)"

In *California Standard Finance Corporation v. Millar,* 118 Cal. App. 185, the court said:

> "The answer fails to plead a lack of consideration. It does not set up the asserted invalidity of the note on account of the pretended violation of the Corpo-

rate Securities Act of California, or otherwise. This is a special defense which should have been pleaded. The defense respecting the want of consideration was therefore not an issue in the case, and the trial court properly sustained objections to the proffered testimony thereof. Upon rehearing, our attention is called to the authorities which definitely determine this matter of pleading. (Pastene v. Pardini, 135 Cal. 431; Kruce v. Parlier Winery, 208 Cal. 723; Fierce v. Reed, 106 Cal. App. 673, 677; Flint v. Siguiere, 50 Cal. App. 314, 318; 6 Cal. Jur. 209, Sec. 138.)"

The Court then proceeded to quote the language of Mr. Justice Henshaw in *Pastene v. Pardini, supra.*

In this case the Supreme Court of California denied a petition for hearing and none of these cases have ever been reversed.

The defense of lack of consideration cannot be raised for the first time on appeal. In *Rivera v. Cappa*, 29 Cal. App. 496, the court said:

"The defense of want of consideration for the execution of a promissory note or other written instrument is new matter, which must be specially pleaded, and it seems to be the rule in this state that a general averment that the note or contract sued on was executed without any consideration whatsoever is but an allegation of a conclusion of law. (Happe v. Stout, 2 Cal. 460; Gushee v. Leavitt, 5 Cal. 160; Winters v. Rush, 34 Cal. 136.) * * * But even if it be conceded that the defendant's answer rested the defense of want of consideration upon the allegation of a conclusion of law, the merits will not be considered upon an appeal supported only by a record which does not show that such objection was interposed by demurrer or otherwise in the court below."

A wife has the right to answer and plead any defense available to a single woman. (*Alderson v. Bell,* 9 Cal. 315, at 322.)

It is immaterial under the California Fraudulent Conveyance Act whether the creditor sought to be defrauded is a secured creditor or wholly unsecured.

In 12 *Cal. Jur.*, page 977, we find the following:

> "The word 'creditor' used in the statutes relative to fraudulent conveyance is a term of wide import. It includes creditors with or without security, and also those whose claims are inchoate, indefeasible and uncertain, or contingent upon a judicial award." (Citing *First National Bank v. Maxwell,* 123 Cal. 360; *Calkins v. Howard,* 2 Cal. App. 233; *Potts v. Mehrmann,* 50 Cal. App. 622.)

In *Calkins v. Howard,* 2 Cal. App. 233, the court said at page 235:

> "It is contended by respondent that Small was not an existing creditor within the meaning of the section cited, because at the time of the sale, no deficiency judgment had been docketed. We cannot concur in this view. A debtor is one who, by reason of an existing obligation is, or may become, liable to pay money to another, whether such liability be certain or contingent. (Civ. Code, sec. 3429.) A creditor is one in whose favor an obligation exists by reason of which he is, or may become, entitled to the payment of money. (Civ. Code, sec. 3430.) A mortgagee is none the less a creditor because the payment of the debt due him is secured by a lien on specific property. As to this property, he is a preferred creditor; but, if a balance remains after the security is exhausted, his right to have recourse against the general assets of this debtor is unques-

tionable. 'The taking of the security operated to suspend the right of proceeding against the property fraudulently conveyed, or any other property of the debtor, until the mortgaged property should be exhausted and a deficiency judgment docketed; but we cannot perceive any principle upon which suspension of the remedy, without more, could operate more favorably upon property fraudulently conveyed than upon other property of the debtor, all being alike subject to the process of law in favor of existing creditors.' (First National Bank etc. v. Maxwell, 123 Cal. 360.)

"The word 'creditor' is given very broad significance in determining the right to assail a fraudulent transfer of property. (Murray v. Murray, 115 Cal. 273; Chalmers v. Sheehey, 132 Cal. 465.) If persons having a claim for a tort, or for maintenance, can be considered creditors, if those whose rights are inchoate, indefinite, uncertain, and contingent upon judicial award, can assail fraudulent transfers, surely a mortgage creditor, pursuing his special remedy and security, is not robbed of the legal status which attaches the moment the obligation is created and continues until the debt is paid."

Along the same line see also *Judson v. Lyford,* 84 Cal. 505; *Bull v. Ford,* 66 Cal. 177.)

In the case of *American Surety Company of New York v. Marotta,* 287 U. S. 513, this court defined a creditor in the following language:

"There being nothing to indicate any other purpose, Congress must be deemed to have intended that in §3-a (1) 'creditors' should be given the meaning usually attributed to it when used in the common-law definition of fraudulent conveyances. (Citing cases.) Under the common-law rule a creditor hav-

ing only a contingent claim, such as was that of the petitioner at the time respondent made the transfer in question, is protected against fraudulent conveyances."

In the face of the law to the contrary, the Circuit Court of Appeals has held that the Bank of America or the Bank of Italy was not a creditor of these dishonest bankrupts, and was not entitled to protection against fraudulent conveyances.

The Circuit Court of Appeals for the 9th Circuit Has Followed a California Case Which Is Entirely Distinguishable From the Case at Bar Namely, Chaffee v. Brown, 109 Cal. 211, in Holding That the Obligation of the Bank Was Unsupported by a Consideration.

In the case of *Chaffee v. Brown* the husband owed an open account for necessaries of life furnished his family. His wife signed a mortgage on a piece of property which constituted her separate property. Nothing in the statement of facts indicates that she signed a promissory note, as did Mrs. Hamaker in the case at bar. When the creditor sought to foreclose the mortgage securing this open account, by action, the defendant raised and pleaded the question of lack of consideration in the trial court. There being no promissory note, *prima facie* importing consideration, as is the case here, and the defense of lack of consideration having been timely pleaded and raised, the Superior Court annulled the mortgage and was sustained by the Supreme Court of California. That most decidedly was not the situation in the case at bar. As we have heretofore pointed out, a promissory note was executed by the bankrupt, a judgment rendered thereon, and

the question of lack of consideration was never raised until the case was in the Circuit Court of Appeals.

The fact that the consideration flowed to the bankrupt's husband in the shape of an extension of time or forbearance for nine years is no defense to the bankrupt. As was said by the Supreme Court of California in *Adolph Ramish, Inc. v. Woodruff*, 2 Cal. (2d) 190, hereinbefore quoted from:

> "Even though the forbearance is for one day only, there is a sufficient consideration as the law does not weigh the *quantum*."

See also:

Damon v. Pardoy, 34 Cal. 278.

The Fraudulent Conveyance.

Under Section 70-a, 11 U. S. C. A., Sec. 110-a, of the National Bankruptcy Act as it existed at all times herein mentioned, and now exists, the Trustee was vested with the title of the bankrupt to all property transferred by her in fraud of her creditors and all property which prior to the filing of the Petition she could have by any means transferred or which might have been levied upon and sold under judicial process against her. (See Bankruptcy Act, Sec. 70-A, Subdivision 4 and 5, 11 U. S. C. A., Sec. 110-a, Subdivision 4 and 5.) Under Subdivision E of the same section the Trustee had a right to avoid fraudulent transfers made by the bankrupt from the person to whom it was transferred unless he was a *bona fide* holder for value prior to the date of adjudication.

Both the bankrupts and the fraudulent transferee, Dr. Boyer, lived in California. Let us assume that after the transfer, had bankruptcy not intervened, the Bank of

Italy or its successor, the Bank of America, after having obtained judgment against Mrs. Hamaker on this promissory note had learned of the transfer of the property to Dr. Boyer, the withholding of the deed from record for over a year, the payment of the income from the property in secret trust to Mrs. Hamaker over a period of many years, the fact that the property transferred was located in the State of Nebraska would in no wise have prevented the Bank from recovering it back. An action could have been instituted in the Superior Court of Los Angeles County against Mrs. Hamaker and Dr. Boyer and upon proof of the facts just set forth, the Superior Court could have entered a decree requiring them, and each of them, to convey the property to a receiver to be sold in satisfaction of the judgment and they could have been compelled to do so by contempt proceedings. In *Pacific Bank v. Robinson, et al.*, 57 Cal. 520, an action was brought by a defrauded creditor. The debtor was in possession of a patent right which was not liable to seizure as tangible property, nor to garnishment. A Receiver was appointed and by decree of the Superior Court at San Francisco the debtor was required to convey his patent right to the Receiver to be sold, the proceeds to be applied in satisfaction of the judgment. The defendant appealed. The Supreme Court of California said:

> "By the law of this State *all goods, chattels and other property, both real and personal, or any interest therein of the judgment debtor*, are liable to execution. (§688 Code Civ. Proc.) And if there be property which cannot be reached by execution, and which the judgment debtor refuses to apply to the satisfaction of the judgment, he may be compelled, upon examination, in proceedings supplementary to execution, to deliver it in satisfaction of the judgment to

a receiver appointed to dispose of it in aid of the execution. (Sec. 564, Code Civ. Proc.) The principle as well as the policy of the law is, therefore, to subject every species of property of a judgment debtor to the payment of his debts. No species of property would seem to be exempt, except such as is especially exempted by law, and any property not directly liable to execution may be reached for the satisfaction of the judgments. This was effected, under the old system of practice, by a proceeding in equity, known as the creditor's bill. After a judgment creditor had exhausted his remedy at law, by the issuance of a *fieri facias*, which was returned *nulla bona*, he had the right to invoke the jurisdiction of a court of equity to aid him, upon the principle of compelling a discovery of assets, tangible or intangible, and applying them to satisfying his execution. (Bruhkerloff v. Brown, 4 Johns. Ch. 671; McDermott v. Strong, *id.* 687; 20 Johns. 554.)" (Italics ours.)

Thus, we respectfully submit that this property constituted property which prior to the filing of the Petition "could by some means have been levied upon and sold under judicial process against the bankrupt or otherwise sequestered or impounded." (Bankruptcy Act, Sec. 70A.) In so far as Dr. Boyer being a holder of this property for value, the Referee was justified in completely discounting the testimony of the bankrupts "that they owed Dr. Boyer some money" and that the transfer was intended as payment therefor. If the court will read the testimony of Mrs. Hamaker we are sure it will be impressed with its evasiveness and uncertainty throughout. She was unable to tell us how much money was owing to Dr. Boyer or how much credit they were supposed to get on the alleged indebtedness by reason of the transfer. She first

denied ever having received any income from the property while it stood in Dr. Boyer's name [Tr. p. 42], and then changed her story when she found out that we had Dr. Boyer's income tax returns showing a consistent credit each year for her half of the income received by him from the property in question. [Tr. p. 59.] Furthermore, the fact that for a period of seven years Dr. Boyer consistently accounted to her for her half of the income received by him and took credit in his income tax returns for it, was another circumstance which clearly indicated the fraudulent nature of the transfer. But that is not all! Plenty of direct evidence existed and was brought out showing the meeting of minds between these parties in a clever scheme to defraud the Bank. The widow of the fraudulent transferee, Mrs. Alicia Boyer, testified at page 67 of the Transcript of Mrs. Hamaker's boasting how she had put it over on the attorneys while concealing her assets. She also testified that when her husband called her down to sign the deed reconveying the property to Mrs. Hamaker she innocently suggested going to a Notary in the Bank of America and he exclaimed, "Oh, my gosh, no! Bill warned me by all means not to go to the Bank of America because they might trace this down." [Tr. p. 67.] She also testified at page 68 of the Transcript that at the time she signed the income tax return for the year 1938 Dr. Boyer said, "See, this is how I account for Ora's income. I deduct it from my own income. That is her income and I make that statement."

Lest it be asserted that Mrs. Boyer was a biased witness, we wish to refer the court to the testimony of A. L. Abrahams, associate of the attorney for the bankrupts. Certainly Mr. Abrahams would not be biased in any way against these bankrupts and he was called as their wit-

ness. His testimony appears at page 70 of the record, *et seq.*, on cross-examination he testified at page 73 of the Transcript as follows:

> "I knew that the property had been transferred to Mrs. Hamaker February 13, 1940. *Dr. Boyer told me that he wanted to give this property back to Mrs. Hamaker but he did not propose to give it to her so that her creditors could get it,* and he asked me in what way it could be done, and I said he could either set up a spendthrift trust or she would have to go through bankruptcy, and those were the only two methods that I knew of whereby he could protect her in the ownership of that property. *She went through bankruptcy.*" (Italics ours.)

If the Bank were not a creditor and recognized as such, why did Mrs. Hamaker go through bankruptcy to discharge a non-existent phantom obligation as she now asserts? If the claim were without merit why was no defense interposed to it in the Superior Court and why was no objection filed to it in the Bankruptcy Court, or the attention of her Trustee called to the fact that the Bank of America had proven a false claim against her estate? Under Section 7 of the Bankruptcy Act it is the duty of the bankrupt under Subdivision 3 of said section to examine the correctness of all proofs of claim filed against her estate, and under Subdivision 7 of the same section the bankrupt is required, in case of any person having to his knowledge proved a false claim against his estate, to disclose that fact immediately to his Trustee. In the case at bar the claim was filed and allowed without objection by the bankrupt, that it was either a false claim or based on no consideration. She apparently felt secure in the belief that her Trustee would never discover back in York, Nebraska, that she had theretofore under the name of

Rachel Orelia Rector [Tr. p. 41], transferred a valuable piece of property to her brother, hence, did not raise any question regarding the validity of her only creditor's claim.

The Circuit Court of Appeals in its Opinion points out that the Nebraska property was transferred to Dr. Boyer in 1933, the Fresno property in 1934, and the judgment against the wife was not taken until 1936.

The Circuit Court of Appeals said:

> "When the wife allowed judgment to be entered against her in 1936 she merely waived any right she might have had to exclude her separate property that she then owned; not property she previously owned."

In making this statement the Circuit Court of Appeals indulges in a rather rash presumption that Mrs. Hamaker did not own this property in 1936 and did not pretend to own it. In arriving at this presumption the Circuit Court of Appeals in its Opinion has completely ignored the secret trust in which the property was held for her benefit and use, out of which she consistently collected the income through the entire period during which the naked title stood in her brother's name. The trier of fact considered this secret trust, the collection of the income, and the credit claimed in Dr. Boyer's income tax returns as clear, convincing evidence of a fraud. He was satisfied that Orelia B. Hamaker never intended to part with possession of the property, but merely to cover up the title and receive the benefits.

Human experience teaches us that a creditor acting in good faith does not accept title to income property in satisfaction of a debt, turn the income over to the debtor each month over a period of seven years without excep-

tion, and then reconvey the property to the judgment debtor without applying one cent of either the capital value of the property, or the income derived therefrom, to the extinguishment of the debt, and we cannot understand the Circuit Court of Appeals completely ignoring this vicious element in the case at bar.

Conflict Between Circuit Courts of Appeal.

For 23 years in the practice of bankruptcy law the writer of this Brief has gone under the assumption that it was the duty of a bankrupt seeking a discharge from his debts to honestly disclose under oath and to surrender all property not expressly exempt under the exemption statutes of his domicile as provided under Sec. 6 of the National Bankruptcy Act. We have always felt that the rule laid down by the United States Circuit Court of Appeals for the 7th Circuit in the *Matter of Breitling,* 133 Fed. 146, correctly set forth the law. As was said by Judge Jenkins in that case:

> "A discharge from one's debts is a privilege created by the Bankruptcy Act upon condition of a surrender to creditors of all the property of the bankrupt except such as is exempted from execution *by the law of his domicile.* There must, therefore, be entire good faith upon the part of the bankrupt. He must surrender his property fully. He may not retain that which should go to his creditors. * * * The Act required the fullest disclosure, the utmost good faith, the surrender of all his estate not exempt under the Act. It is well observed by Judge Brown that: 'A discharge in bankruptcy upon any other condition *than the complete appropriation* of every known asset legally available to the creditors, would not only be a glaring wrong to creditors, but contrary to every conception of a just system of bankruptcy.' (*In re* Beaudoine, 96 Fed. 536-539.) If

> it be doubtful whether a specified item of property should go to creditors or be reserved by the bankrupt, it is not for him to constitute himself the judge, concealing the fact, but it is his duty to disclose the transaction, that the bankruptcy court may determine the right. (*In re* Gaily, 127 Fed. 538.)" (Italics ours.)

The 9th Circuit has apparently laid down a new rule, namely, that a bankrupt married woman can procure an extension of time on an obligation of her husband by executing a promissory note in favor of the creditor, and after the extension has been procured and default has occurred under the terms of the promissory note, transfer her property in the face of a suit against her, go through bankruptcy, get the property back after her discharge, and defiantly retain it. The writer has also felt that the attitude taken by this court in the cases of *Buffum v. Barceloux Co.*, 289 U. S. 227, and *Sampsell v. Imperial Paper & Color Corp.*, 313 U. S. 215, constituted a reliable guide as to the attitude of this court toward transfers by bankrupts to members of the bankrupt's immediate family in an attempt to hold the bankrupt's creditors at bay and retain the beneficial interest in the property for the benefit of the dishonest and fraudulent bankrupt. Certainly the language used by Mr. Justice Cardozo in *Buffum v. Barceloux Co.* and by Mr. Justice Douglas in *Sampsell v. Imperial Paper & Color Corp.* is clear enough to inform the world that this court will not condone fraud in bankruptcy proceedings. Although both of these cases were called to the attention of the Circuit Court of Appeals for the 9th Circuit it seems to have paid but little attention to the philosophy therein expounded, and we respectfully submit that the judgment of the Circuit Court of Appeals should be reversed.

Conclusion.

If the opinion in this case is permitted to stand we can easily foresee a large crop of fraudulent bankruptcies, particularly in the community property states, most of which are in the 9th Circuit. It is well known that banking institutions customarily require the signature of a wife on promissory notes of the husband's which may effect community property. This is not a mere idle gesture but is intended just as a promissory note imports, to make both the husband and wife liable for repayment thereof. If this opinion is permitted to stand, the signature of a wife on her husband's note, whether secured or unsecured, will mean absolutely nothing to a bank extending credit or granting a further extension of credit already previously extended. It will simply mean that the wife may get the benefit of the extension for her husband on the strength of her signature, then after obtaining the benefit, convey her property to a close relative, draw the income, and when sued, go through bankruptcy and get her property back after discharging the troublesome obligation—and keep it. We do not believe that it was ever the intent of the framers of the Bankrupty Act that such an intolerable situation should be condoned, and we do not believe that this court will sanction it. This bankrupt should not be permitted to blow both hot and cold. She should not be permitted to invoke the aid of the bankruptcy court, an equity court, and seek a discharge from a debt, and after obtaining her discharge, now insist that it never existed.

We quote one short extract from the leading California case of *Cioli v. Kenourgious*, 59 Cal. App. 690 at 695:

> "The grantor disposed of his entire property, and the grantees knew it. This was a badge of fraud.

* * * The expectation and pendency of suit created a badge of fraud * * *."

"On the question of relationship in matters of fraud we quote from Bump on Fraudulent Conveyances from page 56, section 67, as follows:

"Relationship is not a badge of fraud. Fraud, however, is generally accompanied with a secret trust, and hence the debtor must usually select a person in whom he can repose a secret confidence. The sentiments of affection commonly generate this confidence, and often prompt relatives to provide for each other at the expense of just creditors. Consequently, relatives are the persons with whom a secret trust is likely to exist. The same principle applies to all persons with whom the debtor has confidential relaitons. Any relation which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances, and serves to elucidate, explain, or give color to the transactions. This doctrine applies to the relationship of father, . . . brother, . . . and so forth. Wherever this confidential relation is shown to exist, the parties are held to a fuller and stricter proof of the consideration, and of the fairness of the transaction."

See also:

Ailee v. Shay, 92 Cal. App. 749 at 761;

McKinney v. Wright, 105 Cal. App. 401 at 407;

Hemmingway v. Thaxter, 150 Cal. 737 at 740.

In the case at bar it was clearly the desire of the parties to this fraud to keep the property in the Boyer family. [Testimony of Orelia B. Hamaker, p. 56.] The relationship between her and Dr. Boyer was very close. [Testimony of Orelia B. Hamaker, Tr. p. 58.]

We respectfully submit that following the doctrine enunciated by this court in *Buffum v. Barceloux Co., supra*, the writ of certiorari should be granted and the judgment of the Circuit Court of Appeals reversed, and that of the District Court and the Referee affirmed. (*American Surety Co. of New York v. Marotta*, 287 U. S. 513.)

Respectfully submitted this 6th day of July, 1945.

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Service of the within and receipt of a copy thereof is hereby admitted this.....day of July, A. D. 1945.

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